

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
Whitbeck, C.J., Sawyer and Jansen, J.J.

KEVIN SMITH,

Plaintiff/Appellee,

vs.

LOUIS KHOURI, D.D.S., AND
LOUIS KHOURI, D.D.S., P.C., and
ADVANCE DENTAL CARE CLINIC, L.L.C.,
Jointly and Severally,

Defendants/Appellants.

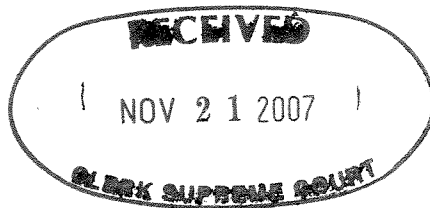
Supreme Court No. 132823

Court of Appeals No. 262139

Lower Court No. 03-047984-NH

AMICUS CURIAE BRIEF OF THE
NEGLIGENCE SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF FACTS

This case involves the review of a Trial Court's award of case evaluation sanctions pursuant to MCR 2.403(O) following a verdict in a dental malpractice case. This appeal addresses whether the Trial Court abused its discretion in awarding the attorney fee aspect of the case evaluation sanction.

It is the understanding of Amicus Curiae, Negligence Section of the State Bar of Michigan (Negligence Section), that prior to trial a case evaluation award was rendered in favor of the Plaintiff in the amount of \$50,000.00. This award was accepted by the Plaintiff and rejected by the Defendant. After a trial the total judgment equaled \$46,654.54. Thus Plaintiff was entitled to case evaluation sanctions pursuant to MCR 2.403(O).

The Plaintiff sought case evaluation sanctions including reasonable attorney fees from the Trial Court. After a hearing the Trial Court granted Plaintiff \$65,556.00 in attorney fees including \$450.00 per hour for each of the senior attorneys handling the case as well as \$275.00 per hour for each of their associates handling the case.

Defendant filed an appeal with the Michigan Court of Appeals claiming in part, that the amount of the attorney fee award was excessive and constituted an abuse of discretion by the Trial Court. The Michigan Court of Appeals panel including Chief Judge Whitbeck, Judge Sawyer and Judge Jansen affirmed the Trial Court. This Court granted leave to appeal in an Order dated July 20, 2007

This Court's Order Granting Leave to Appeal states:

"Special attention should be given to: (1) Whether the Trial Court evaluated all factors relevant to the determination of a reasonable fee; (2) Whether the Trial Court applied such factors to all of the attorneys involved; (3) Whether in particular the Trial

Court properly applied factors pertaining to the fees customarily charged in the locality for similar legal services, the novelty and difficulty of the question involved, and the skill requisite to perform legal services; (4) Whether it is relevant to consider the proportionality between the amount of attorney fees and the award of damages; and (5) Whether, if the Plaintiff retained his attorneys pursuant to a contingent fee agreement, this fact should affect the calculation of reasonable attorney fees on the basis of hourly rates.”

The Negligence Section is interested in this Court’s analysis of the issues presented in this case as most of its members are continuously involved in civil litigation in which attorney fees can be claimed and are awarded pursuant to the Case Evaluation Sanction Rule, MCR 2.403(O) as well as other Court Rules and Statutes including but not limited to the Attorney Fee Sanction contained in the Offer of Judgment Rule pursuant to MCR 2.405(A)(6); MCL 500.3148 (automobile no fault claims); and MCL 37.2802 (Elliott-Larsen Civil Rights Act). The Negligence Section is not taking any specific position with regard to whether in this specific case the Trial Court abused its discretion. The Negligence Section is interested though in how the Court’s decision will effect the process which Trial Courts are to employ in determining those fees in future cases. Specifically, items 3, 4 and 5 from the Court’s Order above are of specific interest to the Section. This Brief will address the Negligence Section’s position on these issues.

ARGUMENT

A. Allowing a Trial Court Discretion to Determine Reasonable Attorney Fees Pursuant to the Wood/Crawley Factors is Appropriate and that Analytical Process Should be Retained by the Court.

MCR 2.403 sets forth the rules pertaining to case evaluation. In order to give case evaluation significance, a party rejecting a case evaluation award faces sanctions including having to pay the prevailing party’s actual costs after the conclusion of a trial

pursuant to MCR 2.403(O). MCR 2.403(O)(6)(b) includes within actual costs the following:

“A reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.”

MCR 2.405 is the rule that pertains to Offers to Stipulate to Entry of Judgment. MCR 2.405(D) and MCR 2.405(A)(6) has a similar attorney fee sanction provision associated with it. The Court’s decision in this case will impact both Court Rules.

The purpose the attorney fee sanction provisions have been discussed several times by the Courts. The purposes include encouraging reasonable settlement negotiations thereby expediting the litigation process, Larson v. Auto Owners Insurance Company, 194 Mich App 329, 486 NW 2d. 128 (1992) and to place the burden of litigation costs on a party rejecting a reasonable settlement proposal, Allard v. Citizens Insurance Company, 237 Mich App 311, 602 NW2. 633 (1999).

Michigan Courts have long been guided by the case of Wood v. DAIIIE, 4013 Mich 567, 321 NW 2d. 653 (1982), in ruling on claims for attorney fees in civil litigation. The Wood Court adopted factors set forth in the case of Crawley v. Schick, 48 Mich App 728, 211 NW 2d. 217 (1973), when addressing the issue of attorney fees. The Wood Court stated at 413 Mich 588:

“We adopt the guidelines for determining ‘reasonableness’ set forth in Crawley v. Schick...

The Crawley panel noted that there is no precise formula for computing the reasonableness of an attorney fee, but said that factors to be considered are:

‘(1) The professional standing and experience of the attorney;

- (2) The skill, time and labor involved;
- (3) The amount in question and the results achieved;
- (4) The difficulty of the case;
- (5) The expenses incurred; and
- (6) The nature and length of the professional relationship with the client...'

While a Trial Court should consider the guidelines of Crawley, it is not limited to those factors in making its determination. Further, the Trial Court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the Trial Court's findings on the 'reasonableness' issue was an abuse of discretion."

In addition to the Wood/Crawley factors, the courts have also looked at the Michigan Rules of Professional Conduct, MRCP 1.5 which gives guidance as to what factors should be considered in determining a reasonable fee. Many of those factors are similar to Wood/Crawley. The most important addition to the Wood/Crawley factors is contained at MCRP 1.5(a)(3) which states that a factor to be included in determining the reasonableness of the fee is: "The fee customarily charged in the locality for similar legal services". This factor is something that has been considered by several courts as a supplement to the Wood/Crawley analysis. See Michigan Basic v. Hackert Furniture Distribution Company, 194 Mich App 230, 486 NW 2d. 68 (1992); Temple v. Kelel Distributing Company, 183 Mich App 326, 454 NW 2d. 610 (1990).

The above framework provided to a Trial Court faced with the task of analyzing an attorney fee claim is very workable and should be retained. This framework takes into account the fact that every attorney and every case has its own unique aspects. It provides various factors to aide the Trial Court in making a determination as to what

constitutes a reasonable attorney fee. If a Trial Court follows these guidelines and the award is consistent with the guidelines, the Trial Court's ruling should not be disturbed. Conversely, if the Court does not follow the guidelines it indicates an abuse of discretion and should result in a reversal.

The Negligence Section specifically is concerned with the following three issues:

(1) Use of Surveys: No specific survey should be used as the exclusive piece of evidence in determining the hourly fee customarily charged in a specific community;

(2) Proportionality: That reasonable hourly attorney fee rates should not be tied in some fashion proportionately to the damage award in the case; and

(3) Contingent Fee Agreement: That a contingent fee agreement be considered when determining a reasonable hourly fee.

With regard to each of the above three issues, it is not suggested that these issues should be factors in determining a reasonable hourly fee. It is just that none of these three factors should be outcome determinative. Each of these will be discussed in more depth below.

B. The Trial Court Should be able to Retain its Discretion in Determining a Reasonable Hourly Fee in Each Case and There is No Survey Nor Any Aspect of Any Survey that Should be Outcome Determinative in Making These Decisions.

The Negligence Section supports including the fee customarily charged in a locality as one of the factors that a Trial Court should use in determining a reasonable hourly fee. The concern of the Negligence Section though is that a Trial Court should still be given discretion to award those hourly fees based upon all of the Wood/Crawley factors and Trial Courts should not be directed to use any specific study or survey as an outcome determinative evidentiary tool.

Specifically, the Trial Court in this matter was presented with The State Bar of Michigan's Snap Shot of Economic Status of Attorneys in Michigan, published in November of 2003, which listed hourly attorney fee rates in Oakland County between \$100.00 per hour and \$350.00 per hour with a median rate of \$200.00 per hour. The Negligence Section supports the Trial Court using this kind of survey as part of its evidentiary record in determining hourly attorney fees. What the Negligence Section opposes is that this particular survey (or any survey for that matter) be outcome determinative on these evidentiary issues. Furthermore, the Negligence Section would oppose directing Trial Courts to choose the median or average hourly income from these surveys in making hourly attorney fee determination.

The first Wood/Crawley factor acknowledges that the professional standing and experience of the attorney involved in the case has a specific bearing on what the hourly fee should be. Thus it would be inappropriate to handcuff a Trial Court in assessing the experience and standing of a particular attorney and in directing the Trial Court to award some average or median attorney fee amount as a reasonable hourly fee rate. Again, the Trial Court should have the discretion to make this determination.

The use of any particular survey should be subject to evidentiary analysis at the Trial Court level. Perhaps the survey was not conducted appropriately and therefore is unreliable. Perhaps the survey ignored a specific segment of the legal community. The point is that the parties should have an opportunity to question a survey if there is a valid basis to demonstrate that it is unreliable. The parties should also have an opportunity to supplement the record with other reliable surveys or specific affidavits

from attorneys in the community where they are practicing to establish that the median, lower and upper end hourly rates are different than those reflected in the surveys.

Thus, for example, if the parties to an attorney fee hearing were to present a Trial Court with several affidavits from practicing litigators in a specific community indicating that their rate is higher or lower than those reflected in a survey, those affidavits should be admissible. The Court should be able to consider those affidavits in setting an attorney fee rate for the particular attorney in that case. Thus the Trial Court should not be limited to the rates listed in a specific survey if they are inconsistent with the actual evidentiary record developed in a specific attorney fee hearing. The Trial Court should be allowed to do its job and exercise its discretion in making rulings in these matters.

C. The Proportionality Between a Damage Award and a Claim of a Reasonable Hourly Attorney Fee Should Not Be Outcome Determinative.

In the Order granting leave, this Court indicated that the parties should give special attention to “whether it is relevant to consider the proportionality between the amount of attorney fees and the award of damages.” In the Negligence Section’s opinion, the answer to this question is a qualified “yes” and an unqualified “no.”

The qualified “yes” is based on the recognition that pursuant to the Wood/Crawley factors the following has to be taken into consideration:

“(3) The amount in question and the results achieved”

Clearly, the Wood/Crawley factor is already take into consideration the damage award as part of the “result achieved”. Thus, the size of the damage award is a relevant factor to be considered.

Where the unqualified “no” comes into play is in the suggestion that there should be some type of proportionate ratio that is outcome determinative as to what a

reasonable hourly fee is. This is opposed by both the defendant and plaintiff attorneys in the Negligence Section.

From the defense bar's perspective, it is their goal to keep awards as low as possible. There are certain cases in which a low case evaluation award is rendered due to the factual weakness of the claim. This does not prevent the plaintiff from seeking significant damages at trial. This results in the defendant and their attorneys having to spend significant time and resources in defending the matter. If the defendant is successful in keeping the damage award low it is unfair for the Court to rule that the fee that they charge should be in any way proportionate to the damage award.

A second concern of the defense bar pertains to proportionality on large awards. If this Court rules that hourly attorney fees should be proportionately tied to the amount of the award it could result in unreasonably high attorney fee awards in cases involving large verdicts.

From plaintiff's perspective, the proportionality argument is also unfair. The stated purpose of the case evaluation sanction rule is to promote reasonable settlements and to place the burden of litigation on the rejecting party. A valid case may only be worth a modest amount in damages. It may take a number of hours though to actually prepare the case for trial and try it to a successful conclusion. If a defendant unreasonably refuses to resolve the case at case evaluation (or by way of offer of judgment pursuant to MCR 2.405 for that matter) then plaintiff's counsel should be awarded their actual reasonable attorney fees in having to adequately prepare and try the case to a successful conclusion. The size of the damage award, although relevant under the third Wood/Crawley factor, should not be outcome determinative as to the

amount of the actual reasonable attorney fees resulting from the defendant's unreasonable refusal to settle the claim.

The issue of proportionality is also pertinent in contexts outside of the negligence field as well. Breach of contract claims are perfect examples. Oftentimes, clients have legitimate breach of contract claims with modest damages recoverable. Attorneys will oftentimes take these claims under contingent fee agreements with the understanding that if they win they will be able to collect reasonable hourly fees under either the Offer of Judgment Rule, MCR 2.405(D) or the Case Evaluation Sanction Rule of MCR 2.403(O). A refusal by a defendant to reasonably settle a case for a modest amount should result in the defendant having to incur the costs of litigation of the plaintiff. Again, this is one of the purposes of the court rules. This purpose is defeated if the plaintiff's fees are tied proportionately to the amount of the potential damages recoverable.

D. Whether the Plaintiff has Retained his Attorney Pursuant to a Contingent Fee Agreement Should not be Taken into Consideration in Determining Reasonable Hourly Fees in the Case Evaluation Context.

The text of MCR 2.403(O)(6)(b) states:

“(6) For the purpose of this rule, actual costs are...

(b) A reasonable attorney fee based on a **reasonable hourly or daily rate** as determined by the trial judge for services necessitated by the rejection of the case evaluation.” (emphasis added).

As Appellants in the present matter point out at pages 10-11 of their Brief, the Michigan Court of Appeals has addressed the text of MCR 2.403 and the reason for it in Temple v. Kelel Distributing Company, 183 Mich App 326, 454 NW 2d. 610 (1990). As

indicated in Appellant's Brief at page 10-11, the Court of Appeals stated at 183 Mich App 331:

"The commentary by the mediation evaluation committee to its proposed amendment is instructive. The committee's 'note' following the proposed rule change states that the amendment was intended to require mediation sanctions to be **based on reasonable daily or hourly rate rather than a contingent fee**:

'language is added to sub rule (O)(4) (as renumbered) to make clear that the attorney fee component of costs **must be determined on the basis of a daily or hourly rate, rather than on the basis of a contingent fee.**' " MCR 2.403(O)(4) (note 426b Mich 21)

The defense bar is concerned that if this Court were to rule that making a contingent fee agreement relevant then in the cases involving large verdicts the award of attorney fees will be unreasonably high. Conversely, plaintiffs are of the position that either the contingent fee agreements are relevant across the board (whether the damage award is low or high) or they're not relevant at all.

Again, the purpose of case evaluation sanctions has to be addressed in the context of this discussion. The purpose of case evaluation sanctions is to encourage settlements thereby expediting litigation and to impose upon the rejecting party the cost of litigation. If the cost of litigation is reasonably high due to the number of hours needed to adequately represent a Plaintiff at the time of trial the defendant should not benefit from the fact that the case may have a low award and the plaintiff and his attorney may have a contingent fee agreement. Conversely, the plaintiff should not benefit from this private agreement in the event of a high award. The number of hours that it takes to adequately present the case should be reimbursed at a reasonably hourly rate.

One last point needs to be addressed regarding appellant's argument pertaining to contingent fees. At page 19 of appellant's brief appellant seems to be suggesting that the fact that plaintiff's counsel took the case on a contingency creates some type of expectation on behalf of the attorney that should guide the Trial Court in determining what a reasonable hourly fee should be for that attorney. This concept that an attorney's expectations regarding his or her fee arising from a private agreement between the attorney and the client are totally contrary to the text of the Court Rule which sets fees at an objective reasonable hourly rate. Three different examples demonstrate how absurd this argument is.

First, there is the case in which a plaintiff attorney, pursuant to a contingent fee agreement, obtains a very large verdict. In this case the attorney's compensation expectations equate to a very high hourly rate, far above the rates customarily charged in that locality by hourly attorneys. Just because that attorney's expectations created by the fee agreement were much higher than a reasonable hourly rate should not lead a Trial Court to award a much higher hourly rate.

An attorney can also have a specific fee agreement with the client which sets a very high hourly rate, say \$950.00 per hour. The client may actually pay this amount. The attorney may expect to be paid at this rate. This does not mean that a Trial Court should award that hourly rate just because the attorney's expectations were set at that level by the private fee agreement between the attorney and the client.

Lastly, attorneys sometimes take cases on a pro bono basis with the hope that they then can petition the court for attorney fees pursuant to either a court rule or a statute. The expectation at the beginning for the attorney is to possibly be paid nothing.

Does this mean that if the attorney is successful and entitled to attorney fees pursuant to a court rule or statute that the attorney's billing rate should be zero? Absolutely not.

The bottom line is that an attorney's expectations based upon a private fee agreement with a client entered into at the outset of a case should not be the basis for a court's determination as to what a reasonable hourly rate for attorney fees should be. It should be an objective standard guided by the Wood/Crawley factors with the inclusion of considerations as to what the fee customarily charged in the locality are.

RELIEF REQUESTED

As stated above, Amicus Curiae the Negligence Section of the State Bar of Michigan does not take a specific position with regard to the specific award of attorney fees in this case. The Negligence Section does request that this Court continue to allow Trial Courts to make discretionary rulings on attorney fee awards pursuant to the Wood/Crawley factors with the addition of considering taking into consideration the fee customarily charged in the locality where the case is tried. Our current system works well and should not be altered.



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